Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-956

JOHN BENJAMIN CLOPTON, JR.,
Petitioner,

v.

CITY OF DALLAS,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Did the district court and the court of appeals properly apply the rule established by this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), that after a Title VII case has been fully tried on the merits, the district court must decide the ultimate factual issue of whether the defendant intentionally discriminated against the plaintiff?

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OPINIONS BELOW

The opinion of the District Court for the Northern District of Texas is set out in Plaintiff's Petition for Writ of Certiorari, Appendix A. The opinion of the Court of Appeals for the Fifth Circuit is set forth in Plaintiff's Petition for Writ of Certiorari, Appendix B.

RELEVANT STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a):

"It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

Petitioner John Benjamin Clopton, Jr. (Clopton), a white former employee of Respondent City of Dallas, Texas (City), brought suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., claiming that the City did not promote him to the position of zoning inspector supervisor 13 because of his race. The district court concluded that Clopton was not subjected to an unlawful employment practice in violation of 42 U.S.C. §2000e, et seq., and the Court of Appeals for the Fifth Circuit affirmed the district court's decision on September 5, 1985.

STATEMENT OF FACTS

Clopton originally was employed by the City as a building inspector, civil service grade 11 (R. 36). The City expanded its zoning inspection division by adding four new zoning inspector supervisor 13 positions and one new chief zoning supervisor 15 position (R. 216). Each new position was to be filled by an applicant who successfully completed a competitive civil service examination and interview process (R. 38, 216). Clopton formally applied for the zoning inspector supervisor 13 position and passed the requisite civil service examination (R. 38). He did not, however, apply for the chief zoning supervisor 15 position and did not attempt to take the examination for that position (R. 93).

Applicants who passed the zoning inspector 13 examination were invited to interviews conducted by an ad hoc committee specially appointed for that purpose (R. 216-217, 219). The members of that committee were personally acquainted with Clopton and were familiar with his qualifications; therefore, they did not interview Clopton (R. 218-219).

The evidence which Clopton offered at trial to support his claim of discrimination included his testimony that his experience qualified him for the position of zoning inspector supervisor 13 (R. 35-53, 66-77), and that the City transferred a black employee, Noble Jones, to fill a chief zoning supervisor 15 position in accordance with the City's equal employment opportunity goals (R. 54-62). The City introduced evidence at trial that Clopton was rejected because he was unqualified and not because he is white (R. 48-49, 217-219, 225, 227-230, 243, 248). The City also offered evidence that the transfer of Jones was unrelated to Clopton's rejection for a different position (R. 164-173, 220), and was based upon Jones' qualifications rather than his race (R. 110-112, 130-136, 140-143, 157-161, 230-231, 236-238, 244).

SUMMARY OF ARGUMENT

The district court and court of appeals properly applied the rule established by this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), by focusing upon the ultimate factual issue of the presence or absence of discrimination after the full trial on the merits in this case. Clopton has failed to demonstrate any departure from the consistent application of *Aikens* by all federal courts of appeals; therefore, the writ of certiorari should be denied.

ARGUMENT AND AUTHORITIES

THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THE RULE ESTABLISHED BY THIS COURT IN *UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. AIKENS*, 460 U.S. 711 (1983), THAT AFTER A TITLE VII CASE HAS BEEN FULLY TRIED ON THE MERITS, THE DISTRICT COURT MUST DECIDE THE ULTIMATE FACTUAL ISSUE OF WHETHER THE DEFENDANT INTENTIONALLY DISCRIMINATED AGAINST THE PLAINTIFF.

Prior to this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), lower court opinions indicated confusion regarding the evidentiary evaluation of Title VII cases. *Aikens* instructed lower courts that their technical evidentiary analysis of the case should not obscure the fundamental factual inquiry of whether the defendant intentionally discriminated against the plaintiff. *Aikens*, 460 U.S. at 715, citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Aikens, in clarifying the proper district and appellate court review of Title VII cases, held that, as in any case, a Title VII plaintiff may prove his case by direct or circumstantial evidence. *Aikens*, 460 U.S. at 714 n.3. *Aikens* further held that after the defendant has offered a nondiscriminatory basis for plaintiff's rejection, the burden of persuasion remains upon plaintiff to prove either that a discriminatory motive more likely motivated the defendant or that the defendant's reason for rejection is in reality merely a pretext for discrimination. *Aikens*, 460 U.S. at 716, citing *Burdine*, 450 U.S. at 256. The ultimate factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. *Aikens*, 460 U.S. at 715, citing *Burdine*, 450 U.S. at 253. After the defendant has articulated a nondiscriminatory reason for rejecting the plaintiff, the question of whether the plaintiff properly made out a prima facie case is no longer relevant. *Aikens*, 460 U.S. at 715, citing *Burdine*, 450 U.S. at 253. After the case is fully tried on the merits, the district court must decide which party's explanation of the employer's motivation is the more credible. *Aikens*, 460 U.S. at 716. The *Aikens* analysis has been followed without exception in every circuit. *See Moore v. Devine*, 767 F.2d 1541, 1547 (11th Cir. 1985); *Poolaw v. City of Anadarko, Oklahoma*, 738 F.2d 364, 367 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 784 (1985); *Casillas v. United States Navy*, 735 F.2d 338, 343 (9th Cir. 1984); *Bell v. Bolger*, 708 F.2d 1312, 1318 (8th Cir. 1983); *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985); *Fields v. Bolger*, 723 F.2d 1216, 1219 (6th Cir. 1984); *Williams v. Southwestern Bell Telephone Co.*, 718 F.2d 715, 717 (5th Cir. 1983); *Miller v. Mercy Hospital, Inc.*, 720 F.2d 356, 360 (4th Cir. 1983) *cert. denied*, 105 S.Ct. 1841 (1985); *Dillon v. Coles*, 746 F.2d 998, 1002 (3rd Cir. 1984); *Sweeney v. Research*

Foundation of State University of New York, 711 F.2d 1179, 1184 (2nd Cir. 1983); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 70 (1st Cir.), *cert. denied*, 105 S.Ct. 433 (1984); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 823 (D.C. Cir. 1984).

The district court in the instant case properly evaluated the evidence presented at trial by focusing upon the issue of discrimination vel non. During the trial on the merits, and following Clopton's presentation of his case-in-chief, Jerry Batts, a member of the ad hoc hiring committee, testified that Clopton was not interviewed for the position because he was considered by the committee to be unsuitable for a supervisory position (R. 219). Batts testified that Clopton was inflexible and created unnecessary problems due to his excessively rigid enforcement of the Building Code (R. 218-219, 225). Batts further testified that Clopton had no experience as a supervisor and that he lacked the quality of judgment needed to equitably administer and enforce the new sign ordinance (R. 218-219, 225). Batts stressed that an applicant's interpretative skills and flexibility were essential to the successful introduction and enforcement of the new sign ordinance (R. 217-219), and that he would not have selected Clopton for this sensitive position had there existed three times as many openings (R. 219).

Sam Harting, an assistant building official for the City, testified that Clopton had difficulty accepting "equivalence," which permits code enforcement officials discretion in their interpretation of the codes (R. 227-230), and that Clopton often refused to accept the building official's interpretation of the Building Code without written instructions (R. 227-230). It was Harting's belief that these problems clearly evidenced Clopton's inflexibility in the area of code enforcement (R. 229-230).

Ray Couch, who worked closely with Clopton in the City's building inspection division, testified that Clopton was argumentative, excessively opinionated and uncompromising, distrusting of management, and incapable of working within the system as a "team player" (R. 243, 248).

The district court found the testimony of Batts, Harting and Couch to be credible and convincing.

Clopton thereafter offered no evidence that the opinions of Batts, Harting and Couch regarding Clopton's unsuitability as a supervisor were based upon his race. Rather, Clopton admitted that the reasons given by the City's witnesses at trial for his not being selected to the position were identical to those given him by Harting in 1973. Those reasons included Clopton's inflexibility, his stereotypical attitudes, his problems in field enforcement, and his insufficient field enforcement and supervisory experience (R. 48-49). Clopton himself offered evidence that he was "too inflexible for code enforcement" (Defendant's Exhibit 5, admitted on Plaintiff's motion). This evidence, along with the uncontradicted testimony of Batts, Harting and Couch, clearly showed that Clopton lacked the job qualifications described in Plaintiff's Exhibit 4(a), entitled "Specification Classification."

Additionally, Clopton failed to offer any evidence to corroborate his self-serving statements that he was qualified for zoning inspector supervisor 13. The documentary evidence which Clopton offered did not support his contention that he was qualified as a supervisor, and never, during his eight-and-one-half year tenure with the City, did he serve in that capacity.

Nor did Clopton offer evidence of racial motivation. On the contrary, Clopton admitted that he had no such evidence from the City management (R. 94). Clopton admitted that his conclusion of race as a factor in the promotion decision was based upon gossip, hearsay, rumor, "office scuttlebutt," and a 1971 memorandum (Plaintiff's Exhibit 23), the last of which he did not connect either to those making the employment decisions in this case or to the decisions they made (R. 94-95). Clopton also admitted at trial that the interview committee rejected him and instead selected four white males who were appointed to fill the vacant zoning inspector supervisor 13 positions he sought (R. 217-218).

Clopton's allegation of racial discrimination apparently is based upon the transfer of Noble Jones, a black City employee, to fill the chief zoning supervisor 15 position (R. 168-173). Jones' background before 1973 and his work experience thereafter indicate his superior supervisory talents. Jones testified that he worked his way up through the Ben E. Keith Company, from warehouse helper to warehouse supervisor to salesman (R. 133-134, 157). Jones also worked for the Jackson Brewing Company as manager of Public Relations in a three-state territory (R. 135-136, 157-158). Immediately before working for the City, Jones worked for Great Commonwealth Life Insurance Company where he became district manager with full personnel responsibilities in his East Texas district (R. 136-138, 158-159). Jones' experience with the City before 1973 included code enforcement in the department of urban rehabilitation and in the weights and measures division of the department of consumer affairs (R. 140-143, 159-161, 236-238). Jones at the time of trial was sector manager for the City's department of housing and urban rehabilitation (R. 161).

James Blackwood, Jones' supervisor in 1973, testified that Jones learned the technical weights and measures code quickly, and applied common sense to the law (R. 238). Blackwood also testified that Jones had an exceptional ability to deal with the public (R. 238).

Couch testified that Jones was an outstanding supervisor (R. 244), and Harting testified that Jones had good interpersonal skills, as well as a flexible and innovative approach to code enforcement (R. 230-231). These opinions of Jones' work performance were consistent with the testimony of William Underhill, manager of employee relations for the City, that Jones was transferred because of his supervisory qualifications and not because he was black (R. 110-112).

Jones' transfer to fill a chief zoning supervisor 15 position was accomplished at a different time and by a different hiring authority than that which rejected Clopton (R. 164-173, 220). Clopton offered no evidence that connected his rejection to Jones' transfer.

Based upon the foregoing evidence, and the failure of Clopton to introduce evidence substantiating his claims, the trial court properly focused upon the fundamental issue of discrimination. The court's conclusion that Clopton failed to prove by a preponderance of the evidence that the City intentionally discriminated against him was in conformity with the analysis and the review standards set forth in *Aikens* and *Burdine*.

Clopton now proposes that because his prima facie case was established by direct evidence of discrimination, the City must prove by a preponderance of the evidence that nondiscriminatory reasons existed for his rejection. This proposition was expressly rejected by the Supreme Court in *Burdine*, 450 U.S. at 256.

The authorities relied upon by Clopton are all cases in which a plaintiff succeeded in persuading the court that the defendant acted with a discriminatory motive. Where a Title VII plaintiff carries the burden imposed by *Burdine* and proves that an illegal animus has played a role in the employer's decision, the burden shifts to the defendant to prove that the adverse action would have been taken for permissible reasons even absent discrimination, thereby precluding the plaintiff from relief. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 357 (1977); *Patterson v. Greenwood School District No. 50*, 696 F.2d 293, 295 (4th Cir. 1982); *Milton v. Weinberger*, 696 F.2d 94, 96 (D.C. Cir. 1982); *Mims v. Wilson*, 514 F.2d 106, 110 (5th Cir. 1975). *See also Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (unconstitutional motive). *See generally* B. SCHEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 36, at 154-155 (Supp. 1983); Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO.L.REV. 17, 30 n. 40 (1984). This issue is not present, however, in the instant case because Clopton failed to meet the fundamental burden of persuading the trial court that discrimination played any role in his rejection for promotion to zoning inspector supervisor 13. *See, e.g., Smith v. State of Georgia*, 749 F.2d 683, 687 (11th Cir. 1985). The authorities cited by Clopton, therefore, are inapplicable in this case.

The district court and the court of appeals followed settled precedent in this case by focusing upon the ultimate factual inquiry of the presence or absence of discrimination after trial on the merits. Clopton has failed to demonstrate any departure from the consistent application of *Aikens* by all federal courts of appeals; therefore, the writ of certiorari should be denied.

CONCLUSION

For the above reasons, Respondent City of Dallas, Texas, respectfully prays that this Court deny the writ of certiorari.

Respectfully submitted,

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